IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE ASBESTOS LITIGATION:	)	
	)	
HAROLD HOWTON	)	C.A. No. N11C-03-218 ASB
REED GRGICH	)	C.A. No. N10C-12-011 ASB
	)	
Limited to: Crane Co.	)	

ORDER

Defendant, Crane Co, moved for reargument for their motion for summary judgment in the above captioned case. Plaintiffs oppose reargument as a rehash of arguments previously made. The standard for reargument under Superior Court Civil Rule 59(e) is well settled.

> On a motion for reargument, the only issue is whether the court overlooked something that would have changed the outcome of the underlying decision. The Court will generally deny the motion unless a party demonstrates that the Court has overlooked a controlling precedent or principle of law, or unless the Court has misapprehended the law or facts in a manner that affects the outcome of the decision. A motion for reargument is not intended to rehash the arguments that already have been decided by the Court.[1]

Defendant's motion consists of arguments that are a rehash or should have been presented in the original motion.[2]

Nonetheless the court will specifically address some of the arguments raised by Defendant. Defendant argues Plaintiffs did not made a sufficient showing to establish a prima facie case. When the court considers such an argument, the court must view the facts in the light most favorable to the

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[1] *Bernhardt v. Ford Motor Co.*, 2010 WL 3005580, at *2 (Del. Super.) (citations and internal quotations omitted).
[2] *Lovett v. Chenney*, 2007 WL 1175049, at *1 (Del. Super.) ("A motion for reargument should not be used for 'raising new arguments.'") (citations omitted).

plaintiff. The judge's role in deciding summary judgment is not to predict how a jury will rule. The essential facts in the cases here taken in the light most favorable to Plaintiff are 1. Defendant's products originally contained asbestos; 2. Many years later Plaintiff worked on Defendant's products; and 3. Plaintiff does not know whether they contained original parts. Glaringly, there are not facts in the record to establish that these products were maintained in such a way that between being installed and Plaintiff's work on them the original asbestos containing parts were removed. While that may well be the case, the court is limited to the record and the non-moving party is not entitled to that inference. The court properly applied that standard and determined that based on the facts and circumstantial evidence in the record a jury could find, without speculating, that it was more likely than not Plaintiff came in contact with original asbestos containing parts attributable to Defendant. A jury may well not find that, however the court is not permitted to make that prediction at this stage.

Defendant cites to three earlier rulings of this judge and contends the rulings challenged here are a departure from those decisions. The court recognizes these are close factual calls, but there are some small differences in the factual record that help explain the different outcomes.

In the *Wolfe* case[3] the ships in questions were no longer commissioned. Instead of the plaintiff working on a commissioned ship, the plaintiff refurbished valves from decommissioned ships. Zidell Industries dissembled

[3] *In re Asbestos Litig. Wolfe*, C.A. No. N10C-08-258 ASB (Del. Super. Feb. 28, 2012) and (Del. Super. Mar. 12, 2012) (hereinafter *Wolfe I* and *Wolfe II* respectively).

the ships and stored salvage parts on one side of the river and the transported them to the other side where the plaintiff refurbished them upon an order for the particular part.[4] The court did not make a finding in that case that the plaintiff ever worked on the defendants' products that originally contained asbestos and to the extent it was possible, the court found it would be speculative.[5] In *Parente*[6] the court found, "there is no evidence in the record to support a finding that Plaintiff was exposed to asbestos attributable to Defendant."[7]

During oral argument in *Howton* the court became convinced and found that Defendant's products on which Plaintiff worked originally contained asbestos. The court informed counsel of this: "I thought I hoped I made it clear that [plaintiff's counsel] had won the battle on the fact that Crane valves, when they were new in 1945, or whenever, more likely than not contained asbestos and I was going to rule in [plaintiff's] favor on that."[8] This is why the court told counsel, "I think the bottom line here . . . is whether there is evidence in the record that this was—there would have been maintenance on these valves."[9] Counsel for three Defendant's were given an opportunity to supplement the record.

At oral argument in *Grgich* Defendant and Plaintiffs were represented by the same firms that had argued *Howton* the week before. The argument

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[4] *Wolfe I* at 2; *Wolfe II* at 2.
[5] *See Wolfe I* at 4-5; *Wolfe II* at 4-5.
[6] *In re Asbestos Litig. Parente*, C.A. No. N10C-11-140 ASB (Del. Super. Mar. 2, 2012)
[7] *Id.* at 5.
[8] *Howton* Oral Argument Transcript Mar. 5, 2012 at 38:14-18.
[9] *Id.* at 24:4-7.

quickly came down to the same issues as in *Howton*. Counsel did not offer additional evidence for the record regarding maintenance histories for Defendant's products or request leave to file supplemental briefing on the issue.

In *Howton* three parties, including Crane Co., supplemented the record after oral argument. Crane offered documents that the court determined were irrelevant and/or unreliable. Counsel supplemented with expert testimony from an unrelated case on ships not in question here. Additionally counsel offered Wikipedia and other website printouts and a navy report that "do not contain sufficient information regarding overhauls for the ships in question for the court to conclude that the original asbestos containing parts must have been replaced prior to Plaintiff working on them."[10]

Therefore, the record was still devoid of facts on this issue as to Crane. On the other hand Warren Pumps, another Defendant then in the case, offered documentation on point by way of an expert specifically addressing the ships in question and Warren Pump's products. Plaintiff withdrew their opposition to Warren Pumps motion for summary judgment, which made the motion moot.[11]

In a motion for reargument the "moving party has the burden of demonstrating 'newly discovered evidence, a change in the law or manifest injustice.'"[12] Defendant has offered a rehash of its prior arguments and has

[10] *In re Asbestos Litig. Howton*, C.A. No. 11C-03-218 ASB at 10 (Del. Super Apr. 2, 2012).
[11] The court offers no opinion regarding Warren Pumps documentation, but apparently Plaintiffs believed it met Warren Pump established the fact and thus the burden is obtainable.
[12] *Id.* (citations omitted).

not met that burden. Accordingly, Defendant's motion for reargument is **DENIED.**

Application for Certification of Interlocutory Appeal

Defendants seek certification from this court for an interlocutory appeal to the Supreme Court. The court is not to certify such an appeal "unless the order of the trial court determines a substantial issue, establishes a legal right, and meets 1 or more" of 5 criteria.[13] Defendants contend the "court has reversed or set aside a prior decision of the court."[14] The court, as explained above, did not create a conflict because the court's decision is based on the facts in the record considered in the light most favorable to the non-moving party. The court applied the proper standard for a motion to summary judgment, the same standard this judge and other judges have applied in asbestos cases. Any difference regarding the outcome is based on the facts in these particular records. The Motion for Certification of interlocutory appeal is hereby, **DENIED.**

IT IS SO ORDERED.

Dated: May 1, 2012

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John A. Parkins, Jr.
Superior Court Judge

oc: Prothonotary
cc: All counsel via e-file

[13] Supreme Court Rule 42(b).
[14] Supreme Court Rule 42(b)(iii).